## APPENDIX "A"

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

—v.—

JACOB MOLINAS,

*Appellant.*

First Department, June 16, 1964.

Crimes—bribery—defendant properly convicted of conspiracy, bribery and attempt to commit subornation of perjury in first degree upon proof of his activities in conspiracies to bribe and actual bribery of members of college basketball teams and attempt to induce witness to testify falsely—not improvident exercise of discretion to deny motion for mistrial when adjournment for five weeks was called because of illness of Trial Judge—sentence excessive but will not be reduced by Appellate Division (Code Crim. Pro., § 543) since sentences of co-conspirators are not before court.

1. The record demonstrates defendant's widespread activities in conspiracies to bribe, and the actual bribery of, members of college basketball teams to influence the outcome of games in which they participated. He also attempted, in the course of the investigation by the District Attorney's office, to induce one of the witnesses to testify falsely before the New York County Grand Jury. Defendant was properly convicted of the crimes of conspiracy, bribery and attempt to commit the crime of subornation of perjury in the first degree.

2. An adjournment during the course of the trial for a period of five weeks due to the sudden illness of the Trial Judge was not prejudicial and did not give defendant the right to a mistrial as a matter of law. It was not an improvident exercise of discretion to deny the motion for a mistrial.

3. The sentence, which aggregates 10 to 15 years, was excessive.

4. The Appellate Division has the power under section 543 of the Code of Criminal Procedure to reduce the sentence but the power will not be exercised in this case because the sentences of the co-conspirators are not before the court and they could not be reviewed or reduced proportionately. Nevertheless, defendant and his co-conspirators are not without a remedy. They may, if so advised, resort to executive clemency. Moreover, defendant, while serving the first of the consecutive sentences, may apply to the sentencing court to suspend execution of the second of the consecutive sentences.

APPEAL from a judgment of the Supreme Court rendered February 11, 1963 in New York County (JOSEPH A. SARAFITE, J.) upon a verdict convicting defendant of the crimes of conspiracy, bribery and an attempt to commit the crime of subornation of perjury in the first degree.

*O. John Rogge* of counsel (*William Sonenshine* with him on the brief; *Evseroff, Newman & Sonenshine*, attorneys), for appellant.

*Alan Frederick Leibowitz* of counsel (*H. Richard Uviller* with him on the brief; *Frank S. Hogan, District Attorney*), for respondent.

*Per Curiam.* Judgment of conviction unanimously affirmed. Defendant was convicted of the crimes of con-

spiracy (Penal Law, § 580) three counts of bribery (Penal Law, § 382) and an attempt to commit the crime of subornation of perjury in the first degree (Penal Law, § 1632). On two of the bribery counts, defendant was sentenced to 5 to 7½ years in prison, the sentences to run consecutively. On the third bribery count, a 5 to 7½-year sentence was imposed to run concurrently with one of the other bribery counts. A concurrent sentence of 1 year and 3 months to 2 years and 6 months was imposed on the count for the attempt to suborn perjury, and defendant received a 1-year suspended sentence on the conspiracy counts. The sum of the terms imposed thus aggregates 10 to 15 years.

The record amply supports the defendant's conviction. That record demonstrates appellant's widespread activities in conspiracies to bribe, and the actual bribery of, members of college basketball teams to influence the outcome of games in which they participated. In furtherance of the conspiracies, a player was paid either deliberately to cause his team to lose a game or to keep the winning margin of his team within a given number of points to permit persons —aware of the nefarious arrangement and betting on the outcome of the contest—to win on their wagers. The conviction on the charge of attempted subornation of perjury resulted from appellant's attempt, in the course of the investigation by the District Attorney's office, to induce one of the witnesses to testify falsely before the New York County Grand Jury.

The intensive investigation which preceded the trial and conviction revealed the corrupting influence of the appellant's multiple conspiracies reached many student players in colleges and universities throughout the country. It was also shown that appellant was the prime planner and guiding force of this widespread criminal operation which corrupted the players who participated and discredited the institutions of learning which they attended. Ten accom-

plices were brought to justice in the Supreme Court, New York County, while others were convicted in different States.

Appellant's assignments of error have been examined and found without merit. We shall allude only to the one claiming that an adjournment during the course of the trial for a period of five weeks due to the sudden illness of the Trial Judge was prejudicial error resulting in a termination of the prosecution on the ground of double jeopardy. There was no showing of prejudice resulting from the adjournment. Before any testimony was taken, the jury was instructed at length as to their conduct in court during trial and during recesses, and appellant has not demonstrated that those instructions were not followed. The jury was admonished by the Trial Judge in accordance with section 415 of the Code of Criminal Procedure, when the court recessed on Friday, November 30, 1962. Over the week end, the Judge was stricken and his illness prevented resumption of the trial until January 2, 1963. In the absence of proof to the contrary, the jurors are presumed to have obeyed the admonition and instructions of the court. The mere lapse of time, without any evidence of any resulting prejudice, under the circumstances of this case, did not give appellant the right to a mistrial as a matter of law, and it was no improvident exercise of discretion to deny the motion for a mistrial.

Appellant also urges that the sentence was excessive. While ample justification exists for the imposition of a substantial sentence in this case, and the sentence imposed was within the legal limits of the law, this court nevertheless is of the opinion that the sentence herein was unnecessarily excessive. Neither the detestible nature of the crimes of which defendant stands convicted, nor the widespread community revulsion they aroused, must divert the courts from the essential purpose of sentencing.

This court in *People* v. *Silver* (10 A. D. 2d 274, 276) expressed the view that the aim of a proper sentence was "not only to encompass the community's condemnation of the defendant's misconduct, but must also evaluate the possibilities of the rehabilitation of the defendant as a useful and responsible member of the community". Punishment less severe in the instant case would have been effective as a deterrent as well as a demonstration to defendant of the destructive folly of his criminal conduct.

This court has the power under section 543 of the Code of Criminal Procedure to reduce the sentence imposed to a sentence not lighter than the minimum penalty provided by law for the offenses of which the defendant has been convicted. (See *People* v. *Speiser*, 277 N. Y. 342.) This jurisdiction to extend mercy to a defendant will not, however, be exercised in the instant case. It may be assumed that, were it not for other related matters, this court would be inclined to modify the sentence herein. But, we are compelled to consider that defendant's accomplices—who had pleaded guilty to bribery and might therefore be eligible for more lenient treatment—would, were we to modify defendant's sentence, find themselves saddled with disproportionately heavy sentences.*

The judgments of sentence of the co-conspirators are not before this court and, therefore, we cannot review or reduce

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* Joseph Hacken pleaded guilty to two counts of bribery. He was sentenced to 3 years and 9 months to 4 years on each count, the sentences to run consecutively, or an aggregate term of 7½ to 8 years in prison.

Joseph Green pleaded guilty to two counts of bribery and was given two consecutive 3 to 3½ years sentences, or an aggregate of 6 to 7 years in jail.

Aaron Wagman pleaded guilty to 38 counts of bribery, but because of co-operation with the authorities, he was sentenced, on only one count, to 3 to 5 years in prison. That sentence was suspended because Wagman had already been in jail in New York for two years, and was serving a sentence in Florida of 5 years in prison, as well as the imposition of a $10,000 fine.

them so as to arrive at proper proportionate sentences for the accomplices, were we to reduce appellant's sentence. Under the circumstances, a proper exercise of discretion requires that we do not, on this appeal, disturb the sentences imposed on appellant. Nevertheless, appellant and his co-conspirators are not without remedy. They may, if so advised, resort to executive clemency. Moreover, defendant while serving the first of the consecutive sentences may apply to the sentencing court to suspend execution of the second of the consecutive sentences although that court no longer has the power to make the second of such sentences concurrent with the first. (See *People* v. *Thuna*, 266 App. Div. 223.)

Breitel, J. P., Rabin, Valente, McNally and Stevens, JJ., concur.

Judgment of conviction unanimously affirmed.

## APPENDIX "B"

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE,
*Associate Judge.*

CERTIFICATE DENYING LEAVE

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THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent,*

—against—

JACOB MOLINAS,
*Appellant.*

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I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York City, New York
July 7th, 1964

ADRIAN P. BURKE
*Associate Judge*

## APPENDIX "C"

STATE OF NEW YORK
COURT OF APPEALS

(Emblem)

ADRIAN P. BURKE,

*Judge.*

July 27, 1964.

Thomas R. Newman, Esq.,
The Woolworth Building,
233 Broadway,
New York 7, New York.

Dear Mr. Newman:

PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

—VS.—

JACOB MOLINAS,

*Appellant.*

Your application for reargument, as you know, was granted, and after hearing you for the appellant, and the District Attorney for the People of the State of New York, respondent, I hereby reaffirm my denial of your application for a certificate for leave to appeal to the Court of Appeals.

I have considered the question you raised under the Constitution of the United States, that the introduction in evidence, over objection, of a tape recording of a conversation between appellant and the accomplice witness Reed, and the introduction in evidence, over objection, of the

transcript of said tape recording, violated appellant's rights under the Fifth, Sixth and Fourteenth Amendments, and find that such contention does not raise a question of law which ought to be reviewed by the Court of Appeals.

Very truly yours,

ADRIAN P. BURKE
*Associate Judge*

## APPENDIX "D"

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 15th day of October, 1964.

Present:

Hon. Charles D. Breitel,
*Justice Presiding,*
" Benjamin J. Rabin,
" Francis L. Valente,
" James B. M. McNally,
" Harold A. Stevens,
*Justices.*

2

The People of the State of New York,
*Respondent,*

—vs.—

Jacob Molinas,
*Defendant-Appellant.*

The above named defendant-appellant having moved for leave to reargue his appeal from the judgment of the Supreme Court, New York County, rendered on February 11, 1963, which judgment was unanimously affirmed by order of this Court, entered on June 16, 1964,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Thomas R.

Newman in support of said motion, and the affidavit of Alan Frederick Leibowitz in opposition thereto, and after hearing Mr. Thomas R. Newman for the motion, and Mr. Alan Frederick Leibowitz opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied.

Enter:

VINCENT A. MASSI
*Clerk*

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT

No. 725

Office-Supreme Court, U.S.
FILED
JAN 6 1965
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

**October Term, 1964**

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THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*against*

JACOB MOLINAS,

*Defendant-Petitioner.*

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FRANK S. HOGAN
*District Attorney*
New York County
*Attorney for Respondent*

H. RICHARD UVILLER
ALAN F. LEIBOWITZ
Assistant District Attorneys
*Of Counsel*

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# Supreme Court of the United States

**October Term, 1964**

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent,*

*against*

JACOB MOLINAS,
*Defendant-Petitioner.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Statement

This is a petition for a writ of certiorari to the Appellate Division of the State of New York, First Judicial Department, to review a decision of that Court, rendered June 16, 1964, unanimously affirming a judgment of the Supreme Court of the State of New York, rendered February 11, 1963 [21 App. Div. 2d 384 (1st Dept. 1964)].

### Background

The petitioner was convicted on February 11, 1963, in the Supreme Court of the State of NewYork, County of New York, after a trial (SARAFITE, J. and a jury), of the crimes of CONSPIRACY (Penal Law §580), three counts of BRIBERY (Penal law §382), and an attempt to commit the crime of SUBORNATION OF PERJURY (Penal Law §1632). The

defendant was sentenced on bribery counts II and III to 5 to 7½ years in prison, the sentences to run concurrently. The sentence on bribery count IV was 5 to 7½ years in prison, the sentence to run consecutively with counts II and III. Petitioner was further sentenced for the attempt to suborn perjury to 1 year and 3 months to 2 years and 6 months, the sentence running concurrently, and on the conspiracy count, the court imposed a one-year suspended sentence.

On June 16, 1964, the Appellate Division unanimously affirmed the judgment of conviction [21 App. Div. 384]. On July 7, 1964, Judge Adrian P. Burke, Associate Judge of the New York Court of Appeals denied an application for leave to appeal to that Court. On July 27, 1964, after reargument, Judge Burke again denied leave to appeal to the Court of Appeals. On October 15, 1964, the Appellate Division denied a motion for reargument.

On November 9, 1964, the Supreme Court of New York (SARAFITE, J.) granted a motion to reduce the sentence by revoking the sentence previously imposed on count IV and re-sentencing petitioner *nunc pro tunc* to 2 to 5 years on that count, the sentence to run consecutively with the 5 to 7½ year sentences imposed on counts II and III.

## Introduction

Jack Molinas was an All-American basketball player at Columbia University, and a professional player in the National Basketball Association. He was also an attorney admitted to practice in New York State. Such impressive

academic and athletic credentials, however, veiled an eager participation in a conspiracy of national scope and importance, the object of which was to corrupt the sport which had brought him fame.

Over a period of four years, from 1957 to 1961, Jack Molinas and his three partners, Aaron Wagman, Joseph Hacken, and Joseph Green, generated a conspiracy which controlled the outcomes of numerous college basketball games throughout the country. Scores, of course, were critical to those who wagered on the games. The whirlpool of dishonesty was further stirred by the greed of backers and players who, with the fixers, not only double-crossed each other but threatened to drown a nationwide program of college sports. Following an investigation initiated and conducted by the New York County District Attorney's Office, the extent of the scandal was fully revealed, and a series of prosecutions resulted in the conviction not only of the four fixers, but of backers and players such as Dave Goldberg, Steven Likometros, Paul Walker, Daniel Quindazzi, Jerry Vogel, Charles Tucker, Lou Brown, and Phillip Lacorte who profited from and encouraged Molinas and his confederates.

The trial of Molinas disclosed a major portion, but by no means the full extent, of the scandal. The record in this trial alone reveals that more than 17 college teams had the results of their games controlled by the desires of Molinas and his betting colleagues. Fully 34 players were solicited by them to influence scores, and at least 30 of the players accepted bribes. Many of the players were further induced to bring friends and teammates into the conspiracy in an effort to assure the effectiveness of the fixes, and expand

the scope of the enterprise. More than 48 games captured the interest of Molinas and his three partners and became the subjects of their venture, and at least 34 games were rigged, Molinas and his confederates being able to control games involving Alabama, Mississippi State, North Carolina, North Carolina State, South Carolina, Bowling Green, St. Josephs, La Salle, College of the Pacific, Tennessee, Niagara, Temple, Connecticut and Columbia. That other schools did not participate was not for want of effort by the fixers who constantly sought to procure as many college players as they could to perpetuate and strengthen the conspiracy. Not only was Green sent as an employee to summer camps to make contacts with players, but Molinas utilized his great athletic skill to inspire admiration among young basketball players, and then turned those who respected him into the pawns of the conspiracy. The fixed games were "sold" to gamblers located variously in St. Louis, Pittsburgh, Chicago, and New York, the whole forming an impressive conspiratorial network in which the tentacles of illegal gambling suffocated the ideals of university sports.

And finally, when the District Attorney's Office in New York began to probe the bribery scheme, Molinas attempted to insulate himself, not only by using his position as an attorney to represent those who might testify against him, but by inducing players to conceal the facts and perjure themselves before the grand jury. With poetic justice, however, the attempt to fix his contest with the authorities assured his own defeat, for two players, Gary Kaufman and Dennis Reed, equipped themselves with instruments to record Molinas' instructions.

Molinas was tried under a five count indictment, the first count, containing 72 overt acts, charging a conspiracy with other fixers and twenty-one college players. Counts II, III, and IV charged Molinas with bribing a Bowling Green basketball player, Dennis Reed, on three separate occasions during two seasons of play. And count V accused the defendant of attempted subornation of perjury, arising from inducements to Reed to testify falsely before the grand jury. Molinas was convicted after a lengthy trial and by overwhelming evidence on all five counts.

## Questions Presented

1. Whether incriminating statements made before arrest by a lawyer, in an attempt to suborn the prospective grand jury testimony of a former conspirator cooperating with the district attorney, are inadmissible because of a denial of counsel.

2. Whether the same statements, recorded on a concealed tape recorder by the district attorney's agent, were obtained in violation of the Fourth Amendment.

3. Whether a 4½ week interruption in the trial, caused by the trial judge's illness, entitled the petitioner to a mistrial despite the fact that no specific prejudice was shown.

## POINT I

**Incriminating statements made by Molinas while attempting to suborn perjury were properly admitted into evidence [answering petitioner's Point 1, pp. 11-14].**

By a rather ingenious combination of one feature from each of two many-faceted cases [*Massiah* v. *United States,* 377 U. S. 201 (1964) and *Escobedo* v. *Illinois,* 378 U. S. 478 (1964)], the petitioner asks this Court to reach the somewhat anomalous result of excluding statements made by a lawyer, during the commission of a crime, because counsel was not present. From the *Massiah* case petitioner takes the fact that the defendant made admissions to an accomplice in the employ of the police, and from *Escobedo* he seizes upon language permitting a police interrogation to be viewed as an accusatorial process. He then analogizes the instant case, and concludes that since suspicion had focused upon Molinas, he became accused, and the police could not question him, in the absence of counsel, through an agent.

One of the college basketball players bribed by Molinas was Dennis Reed, a player at Bowling Green University in Ohio. When the authorities began to unravel the details of the conspiracy, Molinas took steps to conceal his complicity, and in March 1961 he began to secure the cooperation of Reed to avert his capture. Over the ensuing months, Molinas made two trips to Ohio to speak to Reed in person, as well as maintaining contact with him by telephone, Molinas instructing the player to reveal nothing,

but if called before the grand jury to lie about the crimes. Molinas also told Reed to retain counsel, and had Reed write a letter to him asking the petitioner to serve as Reed's attorney, Reed writing the letter as Molinas dictated it. In January, 1962, Reed was brought to New York to appear before the grand jury, and again Molinas instructed him to deny he had ever received money to fix games from Molinas. Reed, however, after consulting with Legal Aid attorneys, decided to cooperate with the district attorney, and agreed to carry a recording device on his person. Reed then telephoned Molinas and was invited to the defendant's law office. There, Reed recorded a conversation in which the defendant instructed him how to lie to the grand jury without risking exposure, and further briefed him on the specific facts that Reed was to deny or not to remember.

In *Massiah* the Court found that the defendant was deprived of his right to counsel where, after indictment, statements were elicited from him by an accomplice, cooperating with the police, and recorded for use in evidence. As the Supreme Court made clear, the decisive factor was that Massiah had already been indicted when the statements were taken, and "an indicted defendant under interrogation by the police in a completely extrajudicial proceeding" must have the aid of counsel. The use of an accomplice, at a time when the police could not freely question the indicted man, was viewed as an indirect means of accomplishing something that could not be done directly. Clearly, of course, Molinas, who had not even been arrested, is not in the same position as an indicted defendant, and as the police could freely question Molinas, so too could they use an agent.

Nevertheless, the petitioner seeks to replace the defect in the analogy with *Massiah*—an unindicted Molinas—with a curious interpretation of *Escobedo*. In *Escobedo* the Supreme Court suggested that an interrogation of a defendant may convert a general investigation into a virtual accusation. The petitioner extends this observation to read that when suspicion focuses upon a suspect, he is entitled to a lawyer, and the failure to provide him with one, or to warn him of his right to counsel, renders any statements made inadmissible. However, such a view is a complete misreading of the holding of *Escobedo*. Indeed, Escobedo is a case quite specifically confined to its own facts, as the twice enunciated holding makes clear. In *Escobedo* the defendant was arrested. He was subjected to a lengthy five hour interrogation with his sister being held as a virtual hostage until he confessed. He requested a lawyer, and was denied a lawyer. Moreover, his counsel attempted to see him during the interrogation, and was kept cooling his heels while the police extracted a confession. Thus, stated simply, *Escobedo* holds, as does *People* v. *Donovan* [13 N. Y. 2d 148 (1963)] that a suspect may not be denied access to counsel who is attempting to see him.

The *Molinas* case is distinguishable in every material aspect. Molinas was not arrested. He was not subjected to a lengthy interrogation. No lawyer was sidetracked from seeing him. He asked for no lawyer, nor was he denied one. Indeed, the fact that Molinas was himself a lawyer is of prime importance. In *Escobedo* the Court distinguished the case of *Crooker* v. *California* [357 U. S. 435 (1957)] where a contrary result was reached on the same issue, by citing two "critical circumstances" dif-

ferentiating the cases. One of these crucial factors was Crooker was "a well-educated man who had studied criminal law while attending law school for a year," while Escobedo was a "22-year-old of Mexican extraction with no record of previous experience with the police."

Not surprisingly, the petitioner's conclusion that a lawyer is required once suspicion focuses leads to a result obviously far beyond anything contemplated in the *Escobedo* case or in any other case. In the present context, it means that Molinas was entitled, as a matter of constitutional law, to counsel during the commission of a crime itself. For the instructions given by Molinas to Reed constituted the crime of attempted subornation of perjury, and the defendant was duly convicted on that charge.

## POINT II

**The tape recording and its admission into evidence did not offend Fourth Amendment protections [answering petitioner's Points 2 and 3, pp. 14-18].**

Attacking the tape recording from another direction, petitioner suggests that it was obtained and introduced into evidence in violation of the Fourth Amendment. However, two insurmountable roadblocks prevent success: *On Lee* v. *United States* [343 U. S. 747 (1952)] and *Lepez* v. *United States* [373 U. S. 427 (1963)], cases almost directly in point.

In *Lopez* an agent of the Internal Revenue Service, Davis, discovered a tax evasion scheme being perpetrated

by the defendant in connection with an inn he operated. Lopez, however, offered a bribe to the agent, and, after Davis accepted some money, they agreed to another meeting to discuss the details. Davis reported the bribe to his superior and, equipped with a portable wire recorder, again met with Lopez in his office at the inn. The conversation was recorded and later used in evidence to supplement Davis' testimony at the trial. This Court held the evidence admissible, pointing out that Davis' misrepresentation to go along with the bribe attempt did not affect the defendant's consent to invite him into his office to talk. Particularly, this Court found no illegality in recording a talk in which the government agent was a participant. The instant case is comparable. Reed, whose testimony Molinas attempted to suborn, first told his story to the authorities, was equipped with a tape recorder, telephoned Molinas and was invited to his office, and then recorded the conversation. Petitioner, however, lists four factors which he feels distinguish this case from *Lopez*. No relevant distinction is shown in any of these contentions.

First, it is stated that Reed misrepresented his true purpose by purporting to seek advice regarding his involvement and thereby gained entrance into Molinas' office. The same, of course, is true in *Lopez,* Davis misrepresenting his intentions in order to record a conversation covering the bribe attempt. While petitioner adds that Davis never concealed that he was investigating Lopez' affairs, he overlooks the fact that by the time of the second conversation, the one which was recorded, Davis, in order to take down admissions of bribery, led the briber to believe that the investigation had been successfully sidetracked.

Similarly, Reed, whose testimony was sought to be suborned on numerous previous occasions by Molinas, went back with the tape recorder to draw the conversation to the facts of the attempted subornation, as well as the bribery and conspiracy in which he had been allied with the Molinas. Of course, the feigned willingness of both Davis and Reed to go along with the schemes in neither case affects the willingness of Lopez or Molinas to invite them to private conversation to continue subverting them. Such a misrepresentation is thus irrelevant to the constitutional claim.

Secondly, it is argued that Reed deliberately steered the conversation to topics designed to elicit incriminating material. Petitioner's suggestion that the same was not true in *Lopez* is erroneous, Davis specifically being instructed to steer the conversation to the initial offer of the bribe [373 U. S. at pp. 430-2]. Lopez's unsolicited bribe offer, which petitioner cites, was made first at the unrecorded interview and its repetition was encouraged at the recorded one. Similarly, Molinas had previously made unsolicited attempts to have Reed conceal Molinas' part in the scheme, and these were later solicited for recording.

The third and fourth efforts to distinguish *Lopez* are related, petitioner arguing that the purpose of the tapes made by Reed was to secure corroboration as a legally necessary element for a New York prosecution, while in *Lopez* it was to secure corroboration only to bolster credibility. Conversely, Molinas took a limited risk in talking with Reed, while Lopez risked prosecution, corroboration not being required to convict him in the Federal courts.

Of course, the purpose of recording Reed's conversation was obviously not only to obtain corroboration as a legal element, but also, as in *Lopez*, to confirm his story and support his credibility. Moreover, since it is perfectly proper to use a tape recording to corroborate testimony, it cannot then become improper to use it simply because a particular jurisdiction deems such corroboration necessary rather than helpful to the prosecution's case. As the opinion in *Lopez* pointed out:

> Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording [at p. 439].

Indeed in his concurring opinion, Chief Justice Warren viewed such corroboration as a correct use of the evidence, by distinguishing *Lopez* from *On Lee* where the electronic device was used "not to corroborate testimony of Chin Poy [the undercover agent], but rather to obviate the need to put him on the stand" [at p. 440], a circumstance not present in this case.

In sum, then, there is no reason to exclude the highly probative and competent evidence obtained by Reed, since no illegality accompanied its acquisition. Reed was law-

fully on the premises, the recording violated no statute, it was not a conversation which could not have otherwise been overheard, the district attorney's agent was a participant in the talk, and he testified at the trial.

Finally, forsaking even weak efforts to distinguish controlling authority, petitioner seeks to have *On Lee* v. *United States* [343 U. S. 747, *supra*] overruled: he thereby acknowledges implicitly that that decision dooms his cause. However, the instant use of evidence is as much controlled by *Lopez* as it is by *On Lee*, a circumstance obviating any need to reconsider *On Lee*. In addition, as pointed out in the concurring and dissenting opinions in *Lopez*, *On Lee*, a sound result when announced, was impliedly affirmed just one year ago.

## POINT III

**The hiatus of one month, in the trial, occasioned by the illness of the trial judge did not entitle the petitioner to a mistrial [answering petitioner's Point 4, pp. 18-20].**

On Friday, November 30, 1962, after five weeks of trial amounting to 2,907 pages of the trial record, the court recessed until the following Monday, Judge Sarafite admonishing the jury in compliance with Section 415 of the Criminal Code. Over the weekend, the judge was stricken with a kidney stone attack and his hospitalization prevented resumption of the trial for four and a half weeks, until Wednesday, January 2, 1963. During this interval, the trial was adjourned several times, although the jury was not reconvened for these motions.

The intermission occurred during the defense presentation, a day and a half after the close of the People's case. Following the resumption, one day was required to complete the testimony, the defendant putting one witness on the stand, the People countering with one rebuttal witness; both sides then rested. The petitioner now pounces upon this delay, and seeks to fashion a claim of prejudice from it. Specifically, it is argued that the separation so prejudiced Molinas that a mistrial should have been granted. However, the vacuum in the trial proceedings provides no material for forging such a *deus ex machina.*

Despite the four week interim, it is highly unlikely that the jury's memory of the facts suffered appreciably. The five weeks of prior testimony, covering the same events again and again on direct and cross-examination, and related by many witnesses to the same events through their own participation, must have considerably reinforced the major facts so that they would not be forgotten. Of course, specific dates and places may not have been accurately recalled, but such forgetfulness in no way prejudices the defendant.

Indeed, the petitioner's argument is somewhat strange in view of the evidence presented. For the better the memory retained by the jury of the People's case, the more disadvantageous it would be to the defendant; time could only blunt the edge of the evidence against him, reducing its effectiveness. [See, *LaPage* v. *Trebirge*, 89 A. 2d 534 (N. H. Sup. Ct. 1952) where the court recognized that a 12 day delay, before the opening of the defense case, would be prejudicial to the prosecution.] And although the petitioner asserts that the nuances of credibility developed

through cross-examination were lost by the hardening of impressions during the interval, nevertheless it is just as likely that the nuances would have remained part of the over-all impression formed.

In addition, even had the hiatus dissipated the jury's ability to cope with the issues, Judge Sarafite, upon resumption of the case, presented every opportunity to allow both sides to resharpen their points, and to allow the jurors to refresh their recollections. The defense was permitted to read to the jury any portion of the record which it was felt necessary to recall. The jurors themselves were told that they could have any testimony reread, and, in fact, they interrupted their deliberations to avail themselves of this opportunity (Mins. of Trial, pp. 3389, 3394, 3399). The court also emphasized to both parties that summations could be as lengthy as necessary in view of the circumstances. Moreover, the recapitulation of the testimony during both closing addresses, and in the court's marshalling of the evidence, provided ample means to recall the evidence into focus, had it become blunted by time. And the fact that the jury deliberated for nine hours, and asked pertinent questions, indicates a calm and deliberate attention to all the evidence in the case.

To further imply that the jury might have been improperly influenced during the hiatus not only trammels on the most basic tenets of the jury system, by suggesting the disregard of clear instructions by the jury, but is an assumption based totally on unfounded speculation. Thus it has been universally and necessarily held that in the absence of a showing to the contrary the jurors are presumed to have obeyed the admonition and instructions of the

court [*State* v. *Williams*, 192 La. 713, 189 So. 112 (1939); *State* v. *Fouts*, 79 Ohio App. 255, 72 N. E. 2d 286 (1947), *cert. denied* 331 U. S. 853 (1947); *State* v. *Burns*, 79 Utah 575, 11 P. 2d 605 (1932); *Hile* v. *State*, 54 Okla. Crim. 137, 15 P. 2d 1049 (1932); *Lutwak* v. *United States*, 344 U. S. 604, 617-19 (1953); *Oper.* v. *United States*, 338 U. S. 84, 94-5 (1954); *Blumenthal* v. *United States*, 332 U. S. 539 (1947); *Delli Paoli* v. *United States*, 352 U. S. 232, 242 (1957); *People* v. *Gowasky*, 244 N. Y. 451, 464 (1927); *People* v. *Barnes*, 202 N. Y. 77, 85 (1911)]. In *Fouts* the Ohio Court stated:

> Unless and until the contrary is shown of record, we are required to adhere to the well established principle of law that it is presumed that the jurors obeyed the instructions and admonitions of the court

Indeed, although more protracted, the delay occasioned by the judge's illness differs only in degree from the many evenings and weekends that the jurors spent at home during the course of the trial. Moreover, during the greater part of the hiatus, there was little opportunity for publicity concerning the case, all the newspapers in the city being then on strike, and the absence of testimony during the hiatus itself providing no news for broadcast or publication.

Furthermore, under the circumstances, it would have been a terrible miscarriage of justice to have granted the motion for a mistrial, for the prejudice to the People would have been enormous. The prosecution assembled twenty-four witnesses, many of whom traveled great distances to attend, Reed, for instance, being brought in from Germany, and Falantano from Alaska. In addition, a protracted trial works a considerable hardship on the jurors involved. More than a full panel of 150 jurors was exhausted in se-

lecting the talesmen and their four alternates. Moreover, with the end of a long trial in hand, only one more day of testimony being required, it would have been a grave error to set aside the work of all concerned because of the misfortune befalling the judge. Surely, unless convincing evidence is shown that the delay prevented the defendant from receiving a fair trial—and no such proof appears—it cannot be an abuse of discretion for the judge to deny a new trial.

In the few cases reported, where lengthy delays were necessitated, new trials were denied unless prejudice was convincingly shown. In *Ossenkop* v. *State* [86 Neb. 539, 126 N. W. 72 (1910)] several defense witnesses contracted smallpox in the midst of the trial and had to be quarantined for at least 10 days. The case was adjourned and the jury admonished and released. On appeal it was held that a motion for a mistrial was properly denied, the court stating:

> That any juror disregarded this admonition of the court is not suggested by the record * * * The conduct of the jurors has not been impeached * * * There is nothing to show that any member of the jury was subjected to improper influences during the intermission * * * In allowing them to separate, neither abuse of discretion on the part of the trial court nor prejudice to defendant is shown by the record.

In *Sullivan* v. *Aliquippa and S. R. Co.* [57 F. Supp. 353 (WD Pa. 1944)] the illness of the judge after a week of the trial required a four week separation of the jury. Despite the court's declaration that a continuance would usually be inappropriate, the defendant was unable to do more than cite the lapse of time, and the motion for a mistrial

on the grounds of prejudice was thus held to have been properly denied.

Accordingly, separation being required by the illness of the judge, and no evidence existing of any resultant prejudice, and the protracted trial being almost complete, it cannot have been an abuse of discretion to deny the motion for a mistrial. Indeed, as stated in the Appellate Division's opinion, "The mere lapse of time, without any evidence of any resulting prejudice, under the circumstances of this case, did not give appellant the right to a mistrial as a matter of law, and it was no improvident exercise of discretion to deny the motion for a mistrial." [21 App. Div. 2d 384 (1st Dept. 1964)].

Consequently, the mere lapse of time could hardly have infected the trial with a disability of constitutional dimension.

## Conclusion

***The petition for writ of certiorari should be denied.***

Respectfully submitted,

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